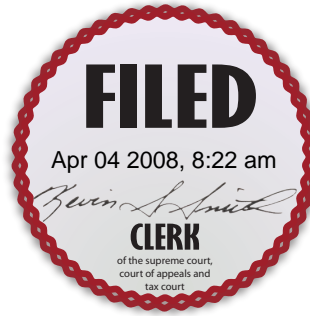


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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RASHURD SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0702-CR-120
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MADISON SUPERIOR COURT  
The Honorable Dennis D. Carroll, Judge  
Cause No. 48D01-9807-C-165

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**April 4, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

On appeal from his conviction of two counts of dealing in cocaine, Rashurd Smith challenges the court's denial of his request for appointed counsel and the denial of his request for permission to file a belated appeal. Finding the latter issue dispositive, we affirm.

## Facts and Procedural History

On July 8, 1998, the State charged Smith with two counts of dealing in cocaine. App. at 1. In February 2000, the State tried Smith *in absentia*, and a jury found him guilty as charged. In March 2000, the court sentenced Smith to an aggregate term of thirty-five years. *Id.* at 6, 7. Smith's trial counsel requested appointment of appellate counsel; the court "decline[d] the request absent the request being made by the defendant himself." *Id.* at 7.

On November 27, 2002, the court received from Smith a petition for leave to file a belated notice of appeal, and noted:

[T]he record herein reflects that [Smith] appeared before the Court with counsel on the first day of jury trial for jury selection, but thereafter he failed to appear without excuse or explanation, and that [Smith] was tried, convicted and sentence in absentia. Accordingly, [Smith is] granted 20 days to file a verified pleading explaining why "the failure to file a timely notice of appeal was not due to the fault of the defendant." ... Ruling on petition deferred.

*Id.* at 7-8. On January 21, 2003, the court denied Smith's pro se petition to file belated notice of appeal.<sup>1</sup> Smith did not appeal this denial. On June 11, 2003, Smith filed a motion for a copy of his trial transcripts. That same day, the court denied his motion, noting that Smith had "waived his right to appeal." *Id.* at 8.

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<sup>1</sup> It does not appear that the court held a hearing prior to denying Smith's motion or that it issued written findings. However, Indiana Post-Conviction Rule 2(1) does not require either of these actions.

On July 15, 2003, Smith filed two submissions: (1) another motion for leave to file belated appeal, this time asking for a complete copy of his trial transcripts; and (2) a petition for post-conviction relief. *Id.* That same day, the court denied the motion for leave to file belated appeal and, in doing so, referenced the entries made on November 27, 2002, and January 21, 2003. *Id.* Smith did not appeal the denial. As for the post-conviction petition, the court forwarded it to the public defender, and it was eventually withdrawn per Smith's request in November 2006. *Id.* at 8, 10.

On November 22, 2006, Smith filed a pro se motion for permission to file a belated notice of appeal and for appointment of counsel pursuant to Indiana Post-Conviction Rule 2. *Id.* at 11. Denying this motion, the court explained:

Comes now the Court [and] reviews the record herein, and notes that [Smith] previously sought permission to file a belated notice of appeal and the same was denied pursuant to the Court's entries and orders of 11/27/02 and 01/21/03. The issues raised by [Smith] in his (renewed) motion for permission to file a belated notice of appeal have already been addressed by the Court and denied by a final appealable order and judgment dated 01/21/03.

*Id.*

On December 20, 2006, Smith filed a notice of appeal. On February 28, 2007, a notice of completion of clerk's record was filed. *Id.* at 38. On January 9, 2008, our court issued an order noting that there is no transcript for this appeal and granting the State's motion to set new due date for appellee's brief. Briefing was completed on March 12, 2008.

### **Discussion and Decision**

Recently, we concluded that a petitioner, who failed to perfect his appeal from the denial of a petition seeking permission to file a belated direct appeal, could not prevail on a

subsequent petition for permission to file a belated appeal under Indiana Post-Conviction Rule 2. *Bosley v. State*, 871 N.E.2d 999, 1001 (Ind. Ct. App. 2007). Bosley had affixed a post-conviction proceedings cause number to a second petition and attempted to re-litigate the matter on which he had failed to perfect an appeal. We noted that Bosley, in effect, “attempted to obtain a second bite of the apple by re-litigating an issue previously decided adversely to him and not reversed on appeal.” *Id.* Citing principles of res judicata, we determined that he was not permitted to do so. *Id.* at 1001-02. We clarified: “although the post-conviction rules do not directly address successive motions for permission to file a belated appeal, it is clear that the post-conviction rules are not designed to allow unlimited challenges to a conviction or sentence.” *Id.* (citing Ind. P-CR 2). As such, the post-conviction court had “erred by considering Bosley’s second petition for permission to file a belated appeal under Post-Conviction Rule 2.” *Id.* at 1002.

Smith has attempted a second and a third bite of the apple – and in an even more overt manner than that used by Bosley. Smith did not even try to repack his argument using a post-conviction cause number. Rather, Smith simply submitted three different petitions for leave to file a belated notice of appeal. When his first petition for leave to file a belated notice of appeal was denied, Smith could have appealed. He did not. The lower court here did not make the same mistake as the one in *Bosley*. Here, the court correctly denied the subsequent petitions for leave to file belated notice of appeal.

Even if Smith had appealed the January 21, 2003 denial of his first petition for leave to file belated appeal, it is unlikely he would have prevailed. Having failed to file a timely notice of appeal within thirty days as required, Smith forfeited his right to appeal “unless

sought under P-C.R. 2.” Ind. Appellate Rule 9(A)(5)). Indiana Post-Conviction Rule 2, which permits a defendant to seek permission to file a belated notice of appeal, provides in part:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

(a) the failure to file a timely notice of appeal was *not due to the fault of the defendant*; and

(b) the defendant has been *diligent* in requesting permission to file a belated notice of appeal under this rule.

The trial court shall consider the above factors in ruling on the petition. Any hearing on the granting of a petition for permission to file a belated notice of appeal shall be conducted according to Section 5, Rule P.C. 1.

If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period.

If the trial court finds no grounds for permitting the filing of a belated notice of appeal, the defendant may appeal such denial by filing a notice of appeal within thirty (30) days of said denial.

Ind. Post-Conviction Rule 2(1) (emphases added).

Generally, a “trial court’s ruling on a petition for permission to file a belated notice of appeal under Post-Conviction Rule 2 will be affirmed unless it was based on an error of law or a clearly erroneous factual determination (often described in shorthand as ‘abuse of discretion’).” *Moshenek v. State*, 868 N.E.2d 419, 423-24 (Ind. 2007); *Beaudry v. State*, 763 N.E.2d 487, 489-90 (Ind. Ct. App. 2002). However, when the trial court does not conduct a hearing before ruling on a petition to file a belated notice of appeal, and the allegations contained in the motion itself provide the only basis in support of a motion, we review the decision de novo. *See Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005).

A petitioner has the burden of proving by a preponderance of the evidence that he is

entitled to the relief sought. *See Land v. State*, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), *trans. denied*. “Therefore, in a proper motion for a belated notice of appeal, he must demonstrate he was diligent in pursuing the appeal.” *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006) (citing *Collins v. State*, 420 N.E.2d 880, 881 (Ind. 1981)), *trans. denied*. “Although there are no set standards defining delay and each case must be decided on its own facts, a defendant must be without fault in the delay of filing the notice of appeal.” *Baysinger*, 835 N.E.2d at 224. Factors affecting this determination include the defendant’s level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether he was informed of his appellate rights, and whether he committed an act or omission that contributed to the delay. *Id.*

Smith’s November 27, 2002 petition for leave to file a belated notice of appeal alleges that a timely notice of appeal was not filed because “of absentia; No evidence that I committed a criminal act.” App. at 15. It also includes two generic allegations that merely track the language in subsections (a) and (b) of Indiana Post-Conviction Rule 2(1). Upon receipt of Smith’s sparse petition, the lower court offered some guidance as to what Smith had to overcome to be successful in his petition for permission to file belated notice of appeal:

[T]he record herein reflects that [Smith] appeared before the Court with counsel on the first day of jury trial for jury selection, but thereafter he failed to appear *without excuse or explanation*, and that [Smith] was tried, convicted and sentence in absentia. Accordingly, [Smith is] granted 20 days to file a verified pleading explaining why “the failure to file a timely notice of appeal was not due to the fault of the defendant.” ... Ruling on petition deferred.

*Id.* at 8 (emphasis added). We have no indication that Smith followed up with any evidence

regarding his level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether he was informed of his appellate rights, and whether he committed an act or omission that contributed to the delay. That is, he makes no attempt to provide an excuse or explanation as to his prior absence. Accordingly, even if Smith had actually pursued and perfected a timely appeal of the denial of his first petition for permission to file a belated notice of appeal, it is unlikely that we would have reversed the trial court's decision.

Affirmed.

BARNES, J., and BRADFORD, J., concur.